IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAN EMIL DONATO, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	}	No. 17473.

APPELLANT'S OPENING BRIEF.

J. B. Tietz,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California,
Attorney for Appellant.

E. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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JURISDICTION.

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of three years [R. 5].[1] Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed in the time and manner required by law [R. 6].

1. R. refers to the printed Transcript of Record.

STATEMENT OF THE CASE.

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction [R. 2].

Appellant pleaded Not Guilty, waived jury trial and was thereafter tried and convicted on May 1, 1961 [R. 4], by Judge William M. Byrne. Appellant was sentenced on May 22, 1961 [R. 5].

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [T. 36].[2]

THE FACTS.

Appellant registered with California Local Board No. 85 on January 18, 1955 [Ex. 1-2].[3]

Thereafter he timely filed the standard eight page Classification Questionnaire on February 21, 1955 [Ex. 5-12]. In it he showed he was one of Jehovah's witnesses, was a minister of religion, regularly serving as such and had been formally ordained [Ex. 7]. He also showed he was a full-time student at Glendale High School [Ex. 10] and that he was a conscientious objector to participation in warfare [Ex. 11]. He advanced no opinion, at the place provided, concerning the classification he deemed proper to his factual status [Ex. 11, below 7.]

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2. T. refers to Reporter's Transcript of Proceedings.

3. Ex. refers to a photocopy of the Government's exhibit (the selective service file of appellant) admitted in evidence by stipulation. The pagination is pencilled at the bottom of each sheet of the exhibit.

Thereafter he timely filed the four page Special Form for Conscientious Objector on March 3, 1955 [Ex. 13]. In it he showed he was opposed to participation in warfare by reason of religious training and belief and that this was in relation to his belief in a Supreme Being [Ex. 13]. He gave scriptural authority to support his statements and reasoning [Ex. 13 (a)]. He explained the part his home teachings had played, he submitted the name and address of a leader of the witnesses in response to the question [#4] upon whom he relied most for religious guidance; he answered question #5 (Under what circumstances, if any, do you believe in the use of force?) as follows: "I believe in using force in protecting my home against crime or violence, my scriptural reference is in Exodus 22:2." [Ex. 14].

He related his studies and religious activities and how he gave public expression to his views. He gave all details requested of his schooling and employment going back to 1942 [Ex. 14].

He gave the Selective Service System further opportunity for checking the details of his showing by giving at question (#6) all residence addresses since 1937 [Ex. 15].

He showed he was a member of a recognized religious organization, gave its national headquarters address and his local church and local leader and answered all other questions propounded [Ex. 15], including the names and addresses of references using all the spaces provided [Ex. 16]. He appended a letter of even date from the

head of the Ministry School of his group attesting to his sincerity [Ex. 15 (a)].

There is no evidence in the file to rebut his *prima facie* case for one of the two conscientious objector classifications.

Nevertheless, the local board, after having plenty of time to check his statements and enter its findings in the file concerning such a check-up [it did not classify him until thirty-five months later, February 19, 1958] classified him Class 1-A (Available for Military Service, § 1622.10, 32 C.F.R.) [Ex. 12].

Thereafter, on July 13, 1960, appellant had an Appearance Before Local Board. A summary of said meeting was prepared and filed by the local board [Ex. 29]. This summary shows the positions of both the appellant and of the board: appellant frankly volunteered that he understood his ministry activity did not meet the ministry classification standards of the Selective Service System and stated "I think I should have a 1-O which is the conscientious objector." [Ex. 29].

The local board's position was that it would not change its classification after learning the following:

1. He would not "go to work if ordered as a 1-O" [Ex. 29].
2. He would protect his relatives in their homes against enemies [Ex. 29].

In court he complained of the accuracy of the summary's account by testifying that the following was the actual statement made by him:

> "I was asked by the Board what I would do in the case of an enemy attack, and for example say my parents, my father and mother were in need of help, they wanted to know if I would protect them. I told them if my father and mother were under my roof, under my support, I would feel it my duty to protect them from any violence of any kind." [T. 29].

We will argue that this self-defense view is approved and does not disqualify the registrant for a conscientious objector classification.

He did not take an appeal for reasons that were related in his testimony; this subject will be argued in our closing brief if appellee raises an issue on it.

Thereafter he was ordered to report for induction and, after going through all the procedures at the induction station refused to submit to induction.

QUESTIONS PRESENTED AND HOW RAISED.

All questions here presented were raised by the Motion for Judgment of Acquittal, timely made and renewed [T. 27, 35].

I

Appellant presented written and oral evidence to his board that he was a conscientious objector. He was not so classified.

The question presented is: Was there a basis in fact for denying him one of the two conscientious objector classifications?

II

The Selective Service File shows that the board was concerned with "clarifying" information in his file and invited him in for an Appearance Before Board for this purpose [Ex. 28].

At said Appearance, which resulted in no different classification, the board revealed the subjects of its concern, and, we will argue, thus revealed the bases for its classifying action.

The question presented is: Were these legitimate bases?

SPECIFICATION OF ERRORS.

I

The district court erred in failing to grant the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT.

I

The appellant made out a *prima facie* case for at least one of the conscientious objector classifications. Nothing exists in the file to contradict it nor to impeach his sincerity or veracity.

Therefore, no basis in fact exists for denying him one of these classifications consequently, the 1-A classification, and the order thereon to report for induction were invalid and a not guilty judgment was required.

II

Appellant's claim for a conscientious objector classification was rejected by reason of and through the use of illegal standards, in that none of the standards used is authorized by law or reason.

ARGUMENT.

I.

No Basis in Fact Is Present to Support the Denial of a Conscientious Objector Classification.

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson* v. *United States,* 346 U.S. 389 (1953). That decision requires that the board "[m]ust find and record affirmative evidence that he has misrepresented his case * * *"—346 U.S., pp. 396, 397, 399 (dissenting opinion.) This agency and court decisions below in Donato's case also ignore the doctrine of *Witmer* v. *United States,* 75 S. Ct. 392 (1955), wherein the yardstick of sincerity is made the law. Absent any finding recorded that questions it, the Dickinson doctrine controls. Also ignored are the teachings of *Ashauer* v. *U. S.,* (9th Cir., 1954) 217 F.2d 788, 791; *Blevins* v. *U. S.,* (9th Cir., 1954) 217 F.2d 506, 508; *Brown* v. *U. S.,* (9th Cir., 1954) 216 F.2d 258, 258; *Chernekoff* v. *U. S.,* (9th Cir., (1955) 219 F.2d 721, 725; *Franks* v. *U. S.,* (9th Cir., 1954) 216 F.2d 266, 269; *Hacker* v. *U. S.,* (9th Cir., 1954) 216 F.2d 575, 576.

The Supreme Court, in Dickinson, refers to affirmative, adverse evidence and to its recordation. Here there was none. Both the draft board and, inferentially, the court below relied on bases that we will hereafter argue were illegal.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellant concededly believed in a Supreme Being. He concededly opposed participation in the armed forces. He concededly based those objections on his religious training and belief.

The evidence submitted by the appellant established at least *prima facie*[4] that he had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not in the least based on "political, sociological, or philosophical views, or a merely personal moral code"; that it was entirely based upon his religious training and belief.

In his first contact with his draft board (his Classification Questionnaire, an 8 page form, filed February 24,

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4. The language of Dickinson is:

"But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

"Reversed." (74 S. Ct. 152, 158).

1955), he declared he was a conscientious objector, by signing series XIV [Ex. 11]. On his Special Form for Conscientious Objector he went into considerable detail answering all of the questions propounded [Ex. 13-16]. No complaint was ever made by the board during the administrative processing, or by the prosecution during the trial, that he had failed to answer any pertinent question satisfactorily or had showed any reluctance or lack of frankness.

The Selective Service System raised no question (none is recorded) concerning the veracity of the petitioner. The question therefore is not one of fact, but is one of law; *Dickinson* v. *United States, supra.* The law and the facts in his file, at least *prima facie,* established that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In sum: there is no adverse evidence concerning his veracity or sincerity.

This case presents a legal situation like that faced by the Fifth Circuit in *Williams* v. *United States,* 216 F.2d 350, wherein the Court said:

> "The Supreme Court has simplified the duty of courts in cases of this kind. 'The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities.' Dickinson v. United States, 340 U.S. 389, 74 S. Ct. 152, 157. The District Court stated that it found such evidence, but failed to state what it was. After a diligent search, we have found none." (351).

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements as to his conscientious objections, and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of law rather than one of fact. The question to be determined is: Was the decision (that the evidence did not prove appellant was a conscientious objector opposed to both (or either) combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

At one time many courts were of the opinion that the boards were free to disbelieve anything and everything presented by a registrant. Some likened the registrant to a witness on the stand. This view, whatever merit it possessed became obsolete in draft cases with the advent of Dickinson; it flatly held that a *prima facie* case could not be ignored and, as interpreted by Mr. Justice Jackson and many courts since that the "boards must build a record." So what evidence was required of Donato further than that furnished by him? That he show he was perfect? This Court had held that a conscientious objector need not be a saint: "We are all children of Eve."

Chernekoff v. *United States,* (9 Cir., 1955) 219 F.2d 721 at 724. The law did not require Donato to show his local board anything more. It was up to the board to make a showing if it could, to weaken or destroy his showing. The Supreme Court, in Dickinson, detailed the methods the board could use and the agencies of the government at its disposal to build a showing that he was a liar or a sham or had not painted a true picture.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States, supra* (holding that if there is no contradiction of the documentary evidence showing exemption as a minister, there is no basis in fact for the classification), also applies in cases involving other claims:

Schuman v. *United States,* 9th Cir., 1953, 208 F.2d 801, 802, 804-05.

Weaver v. *United States,* 8th Cir., 1954, 210 F.2d 815, 822-823.

Taffs v. *United States,* 8th Cir., 1953, 208 F.2d 239, 331-332.

United States v. *Hartman,* 2d Cir., 1954, 209 F.2d 366, 368, 369-370.

Pine v. *United States,* 4th Cir., 1954, 212 F.2d 93, 96.

Jewell v. *United States,* 6th Cir., 1953, 308 F.2d 770, 771-772.

Jessen v. *United States,* 10th Cir., 1954, 212 F.2d 897, 900.

United States v. *Close,* 7th Cir., 1954, 215 F.2d 349.

United States v. *Wilson,* 7th Cir., 1954, 215 F.2d 443, 446.

Contra *United States* v. *Simmons,* 7th Cir., 1954, 213 F.2d 901.

Simmons was reversed by the Supreme Court on March 14, 1955, *Simmons* v. *United States,* 75 S. Ct. 397. The reversal was on other grounds, however, and it remained for *Witmer* v. *United States,* 75 S. Ct. 392, to nationally settle the point. In Witmer, it was held that the inconsistent statements and positions of the registrant, gave the Selective Service System a basis in fact for disbelieving his sincerity and denying his claim for a conscientious objector classification. The Court referred to the Department of Justice findings that Witmer had retreated from one deferred claim to another (for a total of three claimed statuses) and had made inconsistent statements, and had offered to contribute to the war effort (395).

Appellant Donato's file cannot be fairly charged with containing any of the above flaws. He was entitled to at least a I-A-O conscientious objector classification. That he might have turned it down, was no excuse for not giving it to him. See *Franks* v. *United States,* (9th Cir., 1954) 216 F.2d 266, 269.

In *Jessen* v. *United States,* (10th Cir., 1954) 212 F.2d 897, 900, after quoting from *Dickinson, supra,* the Court said:

> "Here, the uncontroverted evidence supported the registrants claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

A conscientious objector believes, and governs his professions and conduct accordingly. The relevant evidence here is all on one side, Donato's. His veracity was never questioned.

Since there was no attack on Donato's veracity, the fact that his evidence is mostly his own is no detraction from his *prima facie* case:

> "It is true that in the case at bar defendant's claim to deferment as a conscientious objector rests on his uncorroborated testimony. * * * However, if credible and sincere, a registrant's uncontradicted testimony, although uncorroborated, may not be disregarded." United States v. Wilson, (7th Cir., 1954) 215 F.2d 443, 447.

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson* v. *United States,* 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States* v. *Williams,* No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States* v. *Peebles,* 7th Cir., 200 F.2d 114, 119 and cases cited. Also *Weaver* v. *United States,* (8th Cir.,) *supra; Jewell* v. *United States, supra; Hagaman* v. *United States,* (3d Cir.) 213 F.2d 86; *United States* v. *Izumihara,* D. Hawaii, 120 F. Supp. 36; *United States* v. *Close,* (7th Cir.) *supra.*

This subject was discussed by this Court in a case decided in 1954. In *Shepherd* v. *United States,* (9th Cir.) 217 F.2d 942, we read:

"However, this case differs in an important particular from the Hinkle case where we pointed out that there was no suggestion of any sham or fakery on the part of Hinkle whose beliefs and views were admittedly sincere and genuine. Here it is to be noted the Department's recommendation of a denial of exemption was based upon a disbelief in Shepherd's honesty and sincerity as well as upon the legal conclusions that he could not be a conscientious objector because of his belief in self defense and in theocratic war." (945).

To repeat, and conclude this portion of the argument, no one has questioned Donato's sincerity, or attempted to rebut his *prima facie* case.

II.

The Law Does Not Permit Denials of Conscientious Objector Classifications to Be Based on the Tests Applied to This Appellant.

Congress provided that registrants, professing to be conscientious objectors to participation in warfare, be exempted from military service; Section 6 (j) of the Act. The tests to be applied are set forth in said section and we enumerated them on the second page of this Argument.

The tests applied by the Selective Service System, however, were ones not set forth in the law. They were arbitrary and artificial. The Selective Service System is to classify, not to penalize. The tests actually used are found on page 29 of the Exhibit, the selective service file. The tests used were:

1. "[W]ould he go to work if ordered as a I-O;" He answered "No."

2. "[W]ould he protect relatives." He answered "Yes."

We argue that both these tests are foreign importations, wholly outside the Act and judicial interpretation thereof. They show, at the very least that the board was "clouded" in "their thinking" as the court expressed it in *United States* v. *Kezmes,* W.D. Penn. 1954, 125 F. Supp. 300 at 302.

Ignored by the board and the court below were the holdings of this Court in *Affeldt* v. *U. S.,* (9th Cir., 1954) 218 F.2d 112, 114; *Ashauer* v. *U. S.,* (9th Cir., 1954) 217 F.2d 788; *Blevins* v. *U. S.,* (9th Cir., 1954) 217 F.2d 506, 508; *Clark* v. *U. S.,* (9th Cir., 1954) 217 F.2d 511, 515; *Goetz* v. *U. S.,* (9th Cir., 1954) 216 F.2d 270; *Hinkle* v. *U. S.,* (9th Cir., 1954) 216 F.2d 8.

This is true because a 1-A-O (non-combatant) type of conscientious objector need only have religious objections to a taking of human life; also, because it is now settled that even one who believes in force is not disqualified for a 1-O classification. At one time it was believed that the sanction of any use of force disqualified the registrant. It took a Supreme Court decision to settle this particular argument. *Sicurella* v. *United States, supra.* Belief in self defense and in defending one's religious brethren, as well as a belief preached by many sects of willingness to participate in Theocratic Warfare are not incompatible with conscientious objections to "warfare" as meant by Congress. See *Sicurella, supra.*

When a false basis is used the classification, and the order to report thereon are invalid. This is so even if the

trial court (as here, impliedly) finds a valid basis in fact exists, because it is not for the courts to classify. *Estep* v. *United States,* 327 U.S. 114; also, *Sicurella* v. *United States,* (1955) 75 S. Ct. 403.

Since there was no memorandum made by the board explicitly stating its reasons for denial of a conscientious objector classification it must be presumed that the board action was based on the concerns and reasoning shown in the summary on page 29 of the Exhibit, to wit: that a registrant refusing, in advance, to do 1-O work and one who believes in the western states' law of self-defense takes himself outside the Act's provisions for the conscientious objector classifications.

In addition to the above-cited cases of this Court also see *Close* v. *United States,* (7th Cir., 1954) 215 F.2d 439; it likewise shows that imported and artificial bases, ones not in the Act require reversal.

Also see *Ypparila* v. *United States,* (10 Cir., 1954) 219 F.2d 465, 469, and *United States* v. *Erickson,* 149 F.Supp. 576, 579.

Consequently there was a denial of procedural due process of law in the proceedings contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

It is true that there was a time [before this Court spoke in the 1954 cases above cited and before the Supreme Court spoke in March, 1955 (four decisions)], when it was believed by the Selective Service System, the Department of Justice, and by many judges that a conscientious objector,

by definition, was required to be a pacifist; that a belief in self-defense negated the sincerity of the registrant's expressions of religious conscientious objection to participation in warfare. Although the 2d and 8th Circuits had the opportunity to lead the way[5] by a few months this Court promptly held that the Act did not proscribe a belief in self-defense as soon as the question came before it. See *Clark* v. *United States,* 217 F.2d 511. In this decision this Court also eliminated war-connected work as a legitimate standard for denying a conscientious objector classification:

> "The Hearing Officer believed that registrant was a sincere church member, but his statements on force and employment connected with war effort, in the Hearing Officer's opinion, precluded him from classification as a conscientious objector under the law. Accordingly, he recommended a I-A classification."
>
> * * *
>
> "It must be concluded that no portion of that which was thus before the appeal board furnished any basis for that board's rejection of a conscientious objector's exemption, at least so far as the conscientious objection to combatant military service is concerned." (514).

Hinkle, Franks and *Goetz,* all *supra,* are cited. Also see *Shepherd* v. *United States,* 9th Cir., *supra,* and *Batelaan* v. *United States,* (9th Cir., 1954) 217 F.2d 946. These cases are additionally important to this appellant because of the holding that the existence of an illegal basis for the Department of Justice's recommendation to the appeal

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5. *United States* v. *Pekarski,* 207 F.2d 930 (C.A. 2d, 1953); *Taffs* v. *United States, supra,* 331.

board tainted the classification, although there was also present in the files express disbeliefs in those registrants honesty and sincerity. Appellant submits that his position is better than Shepherd's or Batelaan's, for no classifying agency expressed a disbelief in his honesty or sincerity. On this point also see *Hagaman* v. *United States, supra.*

CONCLUSION.

1. There was no basis in fact for the I-A classification.
2. Illegal bases were the sources of the classification.

Respectfully submitted,

J. B. Tietz,
Attorney for Appellant.

DATED: August 29, 1961.